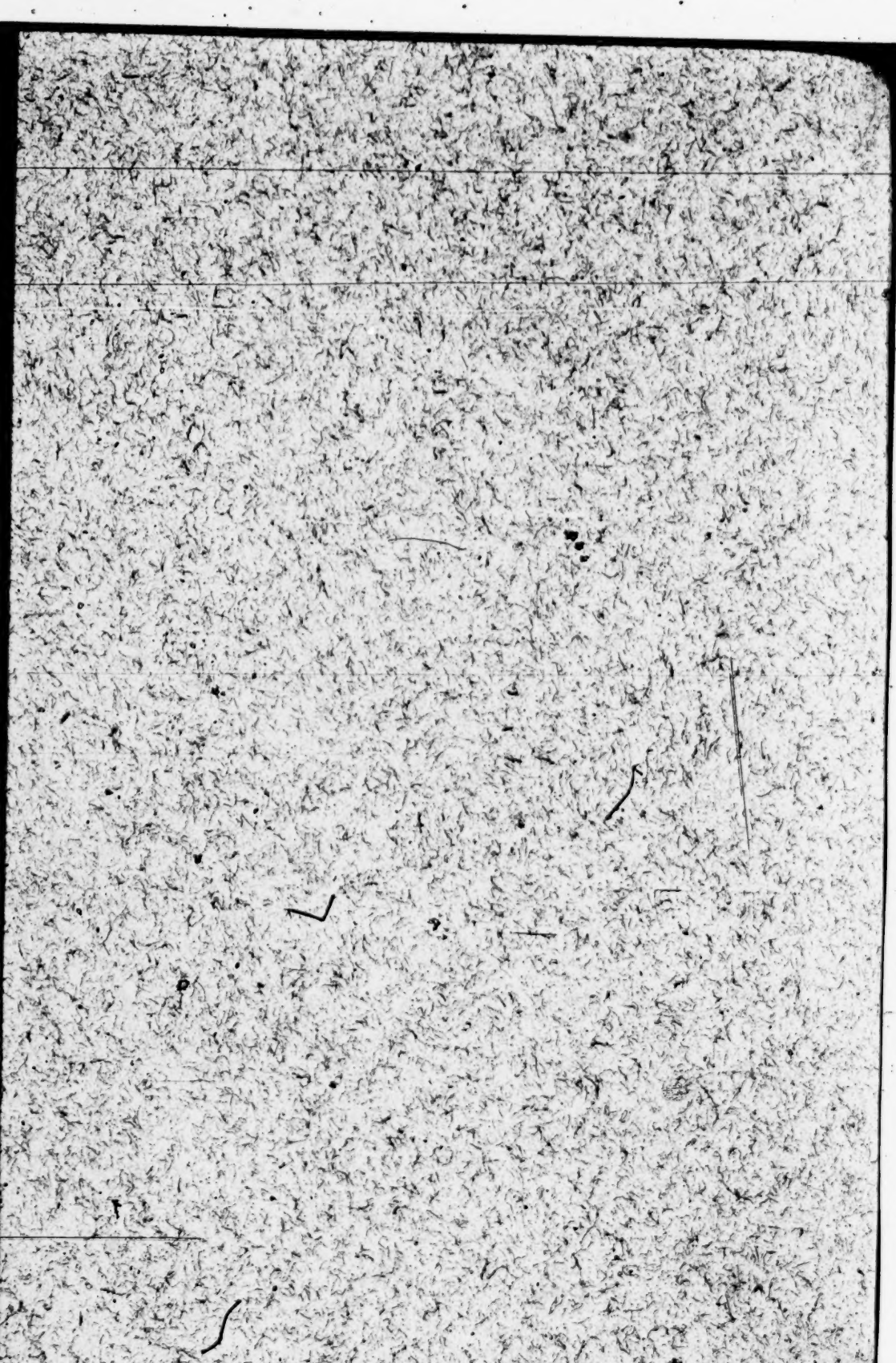

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DEC 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 650

HARTFORD ACCIDENT AND INDEMNITY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION.

WALTER SILLERS, JR.,
W. C. ROBERTS,
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 650

HARTFORD ACCIDENT AND INDEMNITY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OF APPELLEE IN OPPOSITION TO JURISDICTION UNDER RULE 12, PARAGRAPH 3.

No Jurisdiction in This Court.

Appellant, a Connecticut corporation qualified to do business in Mississippi, under the Insurance chapter of Code of 1930, Section 5129, *et seq.*

"Section 5129.—All indemnity * * * companies * * * whether domestic or foreign, transacting or to be admitted to transact the business of insurance in

this state, are insurance companies within the meaning of this chapter, and shall be subject to inspection and supervision of the commissioner."

Section 5131, construed by the Mississippi Court herein, provides, among other things, "all contracts of insurance on property, lives or interests in this state shall be deemed to be made herein."

In *Stuyvesant Insurance Company* v. *Smith Motor Sales Company*, 135 Miss. (1924) 585, 99 So. 575, where the contract was made in Tennessee, Mr. Justice Anderson said:

> "Was the cause of action barred by virtue of the following provision in the policy?
>
> "'Nor unless (suit) commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued then, and in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.'
>
> "This suit was brought here more than twelve months after the loss. Appellant contends that this policy was a Tennessee contract and that, under the laws of Tennessee, the stipulation in the policy above copied is valid and binding, and that therefore, by comity, the courts of this state must interpret and enforce said contract according to the laws of the state of Tennessee.
>
> "Under section 2563, Code of 1906 (section 5028, Hemingway's Code), all contracts of insurance on property situated in this state, regardless of where the contracts were made, are declared to be Mississippi contracts, and are construed according to the laws of this state, regardless of any provisions in the contracts to the contrary. *Fidelity Insurance Co.* v. *Miazza*, 93 Miss. 18, 43 South. 817, 136 Am. St. Rep. 534.
>
> "Under section 3127, Code of 1906 (section 2491, Hemingway's Code), providing that all stipulations in contracts changing the period within which suits must

be brought under our statutes of limitations shall be null and void, the stipulation in question has no binding force. *Standard Insurance Co.* v. *Broom*, 111 Miss. 409, 71 South 653."

Appellant, a Connecticut Corporation, issued a policy, made an exhibit to the declaration, to the Delta & Pine Land Company of Mississippi, a Mississippi corporation, and/or Delta Farm Company, and/or Empire Plantation Company, whose domiciles and businesses nowhere herein appear. By the policy, within sixty (60) days after satisfactory proof, appellant, a Connecticut corporation, promised to pay appellee (without specification where) such pecuniary loss by reason of fraud of its employees "in any position, anywhere" and in the policy under the schedule appended, appeared the name of H. H. Harris, Treasurer; location, Memphis, Tennessee; amount $25,000; premium, $75.00, whose defalcations "occurred in the First Judicial District of Bolivar County, Mississippi, and that by reason of the aforesaid act * * * plaintiff has sustained pecuniary loss in the sum of $2703.79."

Defendant pleaded in confession, that plaintiff "was doing business in the State of Tennessee, and had their principal office in Memphis * * * and defendant was also * * * doing business in the State of Tennessee, and had an agency at Memphis * * *; and plaintiff through its said office at Memphis * * * applied to defendant, through its agency at Memphis * * * for said bond * * * constituting said contract of suretyship and defendant, through its said agency at Memphis, executed and delivered the same to plaintiff at its said office at Memphis * * * and said contract is a Tennessee contract and is governed by the laws of Tennessee" and full faith and credit must be given to decisions therein, observation had of the contract clause and the 14th Amend-

ment of the Federal Constitution, whereunder, by reason of the provisions as to notice, which was not given within fifteen months, defendant is relieved of responsibility.

Appellee demurred, sustained, judgment final, affirmed by the State Supreme Court on a non-Federal ground, as we contend.

The contract is silent as to the place of performance. The record is silent as to what was done by this Mississippi corporation and its co-insurers in Mississippi, or what was the extent of the business done by any of them in Tennessee. The place of payment is not stipulated. The Mississippi Court held, in the following two prior decisions, *Fidelity Mutual Insurance Company* v. *Miazza* (1908), 93 Miss. 18, 46 So. 817; *Stuyvesant Insurance Co.* v. *Smith Motor Sales Co.* (1924), 135 Miss. 585, 99 So. 575, that the indemnity policy issued by this Connecticut corporation to a Mississippi corporation was, as to a defalcation occurring in Mississippi, governed by the statutes of Mississippi, situsing therein all contracts of insurance covering property, lives or interests in this state.

> "A contract insuring property in this state necessarily involves the doing of business in this State, and hence is subject to the laws of this state."

Cowan v. *London Assurance*, 73 Miss. 321, 19 So. 298; *Moses* v. *State*, 65 Miss. 56, 3 So. 140; *Lemonius* v. *Mayer*, 71 Miss. 514, 14 So. 33; *Rose* v. *Kimberly*, 27 L. R. A. 557, 62 N. W. 526, 89 Wis. 545, especially insofar as the question of limitation thereasto may be applicable. *Swing* v. *Cameron*, 145 Mich. 175, 108 N. W. 506, 9 L. R. A. (N. S.) 417, and note page 420, summarizing many cases directly in line. That the Mississippi Court was fully conscious of the 14th Amendment is demonstrated by the limitation of the Cowan case by *Swing* v. *Brister*, 87 Miss. 516, 40 So. 146, when thereasto it said that a prohibition to sue for

a premium would be a violation of the 14th Amendment of the Constitution of the United States. The controversy in the Brister case centered about an assessment made in Ohio June 11, 1901, and the Chapter on Insurance was not enacted in Mississippi until March 5, 1902. Mississippi Acts 1902, 62-96. So that the Brister Case in no wise as to the situs of that insured, interfered with the rule adopted in the Cowan case and restated in this case in direct accord with the authorities collated in the note in 9 L. R. A. (N. S.) 420. Compare *American Fire Ins. Co.* v. *King Lumber Co.* (Fla.), 77 So. 168; *Galliher* v. *Life Ins. Co.* (Ala.), 43 So. 833.

Defendant averred that Article 4, Section 1; Article 1, Section 10; and First Section of the 14th Amendment were contravened. Thereasto, we submit:

(1) Applicability, Not Validity, of Section 5131 Involved; Hence Certiorari, Not Appeal, Appropriate.

The sole issue herein centered upon whether Section 5131 applied to business done by reason of the laws covering defalcations anywhere, and this defalcation being in Mississippi, did it thereby become a defalcation under the terms of the policy, whereasto by reason of its location, the Mississippi statute was construed as applicable.

Compare *Stuyvesant Ins. Co.* v. *Smith Motor Sales, supra.*

That being the question, Certiorari, not appeal, appropriate. *Victor Westling* v. *United States*, 77 L. Ed. 969, 288 U. S. 591; *Bradford Electric Light Co.* v. *Clapper*, 284 U. S. 221, 76 L. Ed. 254; *Public Service Commission* v. *Batesville Telephone Co.*, 284 U. S. 6, 76 L. Ed. 135; *Baxter* v. *Continental Casualty Co.*, 284 U. S. 578, 76 L. Ed. 502; but see *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389, 69 L. Ed. 342; *Home Ins. Co.* v. *Dick*, 281 U. S. 379, 74 L. Ed.

926. Compare *Phila. & R. C. & I. Co. v. Gilbert*, 245 U. S. 162; *Ireland v. Woods*, 246 U. S. 323, 62 L. Ed. 745; *Stadelman v. Miner*, 246 U. S. 544, 62 L. Ed. 875; *Northern Pac. R. Co. v. Solum*, 119 U. S. 561, 30 L. Ed. 513.

With deference, that solely in issue here is the applicability of this statute to the occurrences, all of which is situsedin Mississippi and thereasto the decision of Mississippi is conclusive.

Insurance Co. v. Cravens, 178 U. S. 395, 44 L. Ed. 1172.

(2) (*a*) Palpably No Invasion of the Contract Clause, Because There Was No Subsequent State Statute. *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 40 L. Ed. 91, 94; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451, 68 L. Ed. 382, 385.

(*b*) No Violation of the Full Faith and Credit Clause, Because Mississippi's Laws Were Made Applicable Only to That Occurring Actually Within Mississippi, Whereasto Tennessee Had No Authority.

1. This court bound by local decision. *New York Life Insurance Co. v. Cravens*, 178 U. S. 395, 44 L. Ed. 1122, holds "if we are bound by the interpretation of a statute, we need not review the reasoning by which that interpretation was reached. And we think we are bound by it."

2. Place of performance, in absence of express contract to the contrary may admeasure legal rights. *London Assurance v. Companía, etc.*, 167 U. S. 149, 42 L. Ed. 113; *Farmers, etc. Bank v. Federal Reserve Bank*, 262 U. S. 660, 67 L. Ed. 1164; *Rose v. Kimberly, supra; Galliher v. Life Ins. Co., supra.* And thereunder, as to the matter of insurance, Mississippi had almost plenary jurisdiction. *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gormon v. Hartford Fire Insurance Co.*, 282 U. S.

251, 75 L. Ed. 324; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 76 L. Ed. 214.

3. As to the performance in Mississippi under repeated decisions, it may be controlled by Mississippi law. 13 C. J. 251, and the full faith and credit clause did not extra territorially expand into Mississippi Tennessee's power to subvert that which was by the Legislature in Mississippi done, as to the performance in Mississippi. *Bonaparte* v. *Tax Court*, 104 U. S. 592, 26 L. Ed. 845; *Olmsted* v. *Olmsted*, 216 U. S. 386, 391, 54 L. Ed. 530, 532; *Tennessee, etc. Company* v. *George*, 33 U. S. 354, 58 L. Ed. 997; *Atchison, etc. Ry. Co.* v. *Sowers*, 213 U. S. 66, 53 L. Ed. 700.

4. Tennessee's power over its internal affairs are in no way questioned, but only the contract construed, such construction not necessitating invalidation does not bring jurisdiction here. *Grand Gulf, etc. Co.* v. *Marshall*, 12 How. 165, 13 L. Ed. 938. *Glenn* v. *Goth*, 147 U. S. 369, 37 L. Ed. 206; *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 51, 54 L. Ed. 927.

Counsel cite two cases:

(A) *Home Insurance Company* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926, whereasto we submit:

The opinion therein said:

> "We need not consider how far the State may go in imposing restrictions on the conduct of its own residents and of foreign corporations which have received permission to do business within its borders * * *."

The Texas court sought to integrate a Texas statute into a Mexican contract, to be performed in Mexico and this court properly held "it may not validly affect contracts which are neither made nor are to be performed in Texas."

But this contract has to do with insurance in Mississippi between a Connecticut corporation and a Mississippi cor-

poration and two other corporations, whose domicile is Mississippi, we assume, appellant not pleading the contrary. The averment as to the appellee is that its principal office was in Memphis. What was thereat done does not appear. Whether premiums were there paid, losses there adjusted, and the line of demarcation between what was in Mississippi and what was in Tennessee are by the plea left, to say the least of it, uncertain.

The rule as to Mississippi law is integrated into all contracts covering property in Mississippi, especially when made by residents of Mississippi with insurance companies authorized locally to do business, having been well settled since *Moses* v. *State*, 65 Miss. (1887) 60, 3 So. 140; *Cowan* v. *London Assurance*, 73 Miss. 321 (1895), 19 So. 298. That such a provision in a Mississippi policy was absolutely void was settled thoroughly in Mississippi. *Standard Accident Ins. Co.* v. *Broom*, 111 Miss. 409, 71 So. 653; *General Accident, etc. Co.* v. *Walker*, 99 Miss. 404, 55 So. 51; *Dodson* v. *Western Union Tel. Co.*, 97 Miss. 104, 52 So. 693; *National Casualty Co.* v. *Mitchell*, 162 Miss. 197, 138 So. 808.

With this uncertainty, Judge McGowen in his opinion was precisely correct in declaring, "Where the contract is silent, the place of making the contract is presumed to be the place of performance in this case the payment by the indemnity company of a default of any of the employees of the appellee. See *Jones* v. *Perkins*, 29 Miss. 139, 64 Am. Dec. 136." As stated by Judge McGowen, this policy covered a defalcation of Harris, "in any position, anywhere" and when he, as an employee, embezzled in Mississippi, its interest in Mississippi was thereunder indemnified by appellant in Mississipi, as a Mississippi contract, because it then affected lives, property and interest in Mississippi. "The contract of indemnity * * *, permitted the removal of the employees to any place and indemnified

against loss wherever it occurred, there being an interest of the appellee indemnified, and the appellee having removed to Mississippi, and defalcation occurring herein * * *", the contract became an indemnity contract against loss of interest of appellee in Mississippi, especially under the Mississippi cases quoted, *supra*, under which Mississippi has meticulously applied to all transactions in her borders the rule as to limitation prescribed in her statutes and has not permitted rights as to them to be divested by a foreign state through extraterritorial legislation.

(B) *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389, 68 L. Ed. 342, is likewise not controlling for there "the Texas statute was incapable of being constitutionally applied to it, since the effect of such application would be to regulate business outside the State of Texas, and control contracts made by citizens of other states. * * *".

Compare quotation from the Dick case, *supra*, which being decided under common law, of necessity demonstrated that the Dunken case was not controlling thereasto.

As at the date of this contract, under settled judicial decisions of Mississippi, wherewith appellant was familiar, all interest so insured had been situsedin Mississippi, and thereasto Mississippi had made her statutes of limitation controlling, eliminating these short time provisions for the forfeiture of substantial rights, and that here at issue is solely whether this statute applied to this contract as to business done in Mississippi when the contract was between a citizen of Mississippi and a citizen of Connecticut as to interests located within Mississippi, whereover Mississippi was sovereign.

Obviously, the insurance company thought so for in its policy was inserted the provisions as to this limitation "in case such limitation be void under the law of the place

governing construction hereof, then within the shortest period of limitation permitted by such law." Had the Tennessee law alone been applicable, such a provision would have been inappropriate, but with the Mississippi law applicable it was essential.

In the Dunken case, all related back to the original policy which was admeasured in its obligation by the law of the State of Tennessee. Herein the major portion was as to business being done in Mississippi as to interests there possessed by appellant which operates mammoth farming interests at Scott, and being thus tied to the land—we assume only that which we may by construing the pleading against the pleader—Mississippi regulated that which it was privileged so to do, because done within her borders.

(C) As to the 14th Amendment, we reiterate to save prolixity that observed under (B), *supra*.

Under *Pennsylvania Fire Insurance Co.* v. *Gold*, 243 U. S. 593, 61 L. Ed. 610, this Court said:

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts and such interpretation does not involve a constitutional question."

When, therefore, appellant came into Mississippi, did business in Mississippi, as permitted by the laws of Mississippi, under the sovereignty of Mississippi, it could not complain that it was deprived of its property without due process when in Mississippi but applied to it the same rule it had announced many years before, that all policies covering interests in Mississippi, irrespective of where written, should be construed in accordance with the law of Mississippi as to limitations when sued upon in the Mississippi

courts, and obviously this was correct where the policy was to a Mississippi Corporation, created by Mississippi, operating in Mississippi under Mississippi's laws, with a Connecticut corporation which had qualified to do business in Mississippi in accordance with Mississippi's laws.

Hooper v. *California*, 155 U. S. 648, 39 L. Ed. 297.

Wherefore, it is respectfully submitted that this Court has no jurisdiction hereof, for these reasons and for the reasons admirably set forth in the opinion of the Supreme Court, and this appeal should be dismissed, being lacking in substantial Federal Question, and further not the appropriate right to be exercised in bringing the cause to this Court.

Respectfully submitted,

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